

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

LINWOOD LAUGHY, KAREN)	
HENDRICKSON, and PETER)	
GRUBB,)	
Petitioners/Proposed Intervenors,)	ADMINISTRATIVE HEARING
)	OFFICER'S FINDINGS OF
vs.)	FACT, CONCLUSIONS OF
)	LAW AND RECOMMENDED
CONOCOPHILLIPS AND EMMERT)	ORDER TO THE DIRECTOR
INTERNATIONAL,)	
Applicants,)	
)	
And)	
)	
IDAHO TRANSPORTATION)	
DEPARTMENT,)	
Respondent.)	

I.

INTRODUCTION

This is a formal contested case between the Applicants, ConocoPhillips/Emmert International ("Applicants") and the Respondent, Idaho Transportation Department ("ITD" or "the Department") that was initiated by the notice and order that was issued by the Director of the Department on November 10, 2010. Pursuant to Idaho Code § 67-5241 and IDAPA 04.11.01.100-104, the ITD has issued overlegal permits to the Applicants subject to the condition that the use of the permits is stayed until after the agency decision on the Petition to Intervene. The issuance of these permits represents the order of the Department and is a final agency action on this matter. IDAPA 04.11.01.104. *See also, Laughy v. Idaho Department of Transportation*, 2010 WL 4297807, Idaho Supreme Court 2010 Opinion No. 110 (November 1, 2010), at 14.

IDAPA 04.11.01.104, Idaho Rules of Administrative Procedure of the Attorney General (“Idaho Rules of Administrative Procedure”), provides that through the order of the Director of ITD, the Department may initiate formal contested case proceedings. By Order issued November 10, 2010, the Director initiated formal contested case proceedings upon the matter. At present, the only parties to this formal contested case are Applicants and the ITD.

Petitioners/Proposed Intervenors (“Petitioners”), Linwood Laughy, Karen Hendrickson and Peter Grubb have filed a Petition to Intervene in this matter and have submitted supporting affidavits with their Petition. As part of the requested relief in the Petition to Intervene, the Petitioners have requested the Department not approve the permits until after formal contested case disposition.

The Director requested briefing, legal and factual analysis, statements of position and proposed orders from the parties and proposed intervenors, on two issues:

1. The issue of the alleged direct and substantial interests claimed by the Petitioners as outlined in their Petition to Intervene in the Contested Case Regarding the Coke Drum Transport Project.
2. The issue of whether the Department may or must hold formal contested case hearings before the ConocoPhillips/Emmert overlegal loads are allowed to travel under the permit.

The Petitioners submitted a brief and affidavits of Petitioners in support of their Petition to Intervene. Applicants submitted a brief and affidavits in support of their objection to the Petition to Intervene. Respondent ITD submitted a brief in opposition to the Petition to Intervene. On November 19, 2010, a hearing was held by the Hearing Officer to receive oral

arguments upon the matter. Natalie J. Havlina and Laurence (“Laird”) J. Lucas of Advocates for the West appeared on behalf of Petitioners. Mr. Lucas argued. Erik F. Stidham and Murray D. Feldman of Holland & Hart LLP appeared on behalf of Applicants. Mr. Stidham argued. J. Tim Thomas and Lawrence G. Allen, Deputy Attorneys General, appeared on behalf of Respondent ITD. Mr. Thomas argued. The matter is fully submitted to the Hearing Officer for Findings of Fact, Conclusions of Law and a Recommended Order to the Director.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Applicants had been working with the ITD since 2007 to obtain permits to transport four oversize loads of refinery equipment (sometimes referred to as “drums” or “coke drums”) down U.S. Highway 12 from Lewiston to the Montana border at Lolo Pass. Highway 12 is a two-lane paved road that borders the main stem of the Clearwater River from Lewiston to the confluence of the Clearwater River and the South Fork of the Clearwater River near Kooskia. From the confluence it borders the Middle Fork of the Clearwater River to the confluence of the Middle Fork with the Locksa River and the Selway River. From the confluence of the three rivers, Highway 12 borders the Locksa River almost to the Montana border. The Montana border at Lolo Pass is approximately 175 miles east of Lewiston. The shipments will be large enough to take up the entire two-lane highway, requiring a rolling roadblock along with a number of traffic flaggers and escort vehicles.

The maximum size and weight of vehicles and their loads allowed on state highways are prescribed by statute. See Idaho Code §§ 49-1001, -1002, -1010 (defining the maximum gross load weight and maximum vehicle and load sizes allowed on the highway). For permission to

exceed the weight and size specifications, Applicants had to apply to the ITD for “overlegal” merits under ITD’s rules regarding special permits.

Petitioners, who live and operate businesses along parts of Highway 12, oppose the shipments. They assert that moving the loads down Highway 12 will degrade the local tourism industry, disturb the peaceful enjoyment of their homes, impede highway users from reaching medical care in an emergency, and could create logistical and environmental problems if a drum topples into the river. Petitioners voiced their disapproval by sending numerous comments to the ITD but did not intervene as parties in the application process.

On August 16, 2010, before ITD issued any permits, Petitioners filed a Petition for Judicial Review and Request for Immediate Injunctive Relief. On August 17, 2010, the district court granted a temporary restraining order, enjoining the ITD from issuing the overlegal permits. On August 19, 2010, the district court lifted its restraining order, finding that it did not have jurisdiction over the matter until the ITD issued a final agency order. ITD granted four overlegal permits to Applicants the following day. Then, on August 24, the district court reversed the ITD’s decision to issue the permits. The district court’s decision was appealed to the Supreme Court by ConocoPhillips and ITD. The Supreme Court concluded neither the district court nor the Supreme Court had jurisdiction to consider the petition for judicial review and remanded the case for entry of an order of dismissal without prejudice for lack of jurisdiction.

Laughy at 15.

III.

JURISDICTION OF HEARING OFFICER

The Petition to Intervene was filed on November 2, 2010. Pursuant to IDAPA 04.11.01.410 of the Idaho Rules of Administrative Procedure, the Director appointed the undersigned Merlyn W. Clark to act as Hearing Officer for the purpose of conducting the formal contested case hearing upon the Petition. The Hearing Officer's authority is governed by Rule 413. IDAPA 04.11.01.413.

Applicants have objected to the proceeding to hear the Petition to Intervene, asserting that there are no ongoing proceedings into which the Proposed Intervenors can intervene. Applicants assert that the ITD accepted the negotiated transportation plan and issued the permits on August 20, 2010, and the issuance of the permits was a final agency action under Idaho Code § 67-5241(d).

The Hearing Officer does not read Section 67-5241(c) or (d) to say what Applicants contend. Subsections 67-5241(1)(c) and (d) provide that: "Unless prohibited by other provisions of law: . . . (c) informal disposition may be made of any contested case by negotiation, stipulation, agreed settlement, or consent order. Informal settlement of matters is to be encouraged; (d) the parties may stipulate as to the facts, reserving the right to appeal to a court of competent jurisdiction on issues of law." The statute does not provide that the informal disposition constitutes a final agency order.

The *Laughy* decision establishes that the issuance of the permits in August 2010 was not a final order and did not constitute a final agency action. The Court stated that "[t]he only document in the appellate record that could be a final order is the "Memorandum of Decision"

issued on August 20, 2010, by Alan Frew, Administrator of the Division of Motor Vehicles, Idaho Transportation Department. For that to be a final order, it must fit within one of three definitions, and it does not.” *Laughy* at 12. The Court explained that the permits were not issued pursuant to I.C. § 67-5246(1), by the Idaho Transportation Board, which is the agency head of the ITD and because Mr. Frew is not the Board, his memorandum cannot constitute a final order issued by the agency head. *Id.* The Court further explained that the order was not issued by the agency head upon review of a recommended order under I.C. § 67-5246(2) nor a preliminary order that becomes a final order under I.C. § 67-5246(3). *Id.*

In the absence of a final order, there was no final agency action and there was no jurisdiction in the district court or the Supreme Court, which resulted in dismissal of the action. *Laughy* at 15. The dismissal of the action did not cure the defect that no final order existed. It is still necessary that a final order be issued pursuant to I.C. § 67-5246(1), (2) or (3).

The Director of ITD has initiated this formal contested case proceeding to obtain a final order pursuant to I.C. § 67-5241 and IDAPA 04.11.01.100-104. The Hearing Officer has been appointed pursuant to IDAPA 04.11.01.410 and 413 to conduct the formal contested case hearing in this matter upon the Petition to Intervene and has jurisdiction to determine and recommend an order upon the issues.

IV.

ISSUES

The issues pending before the Hearing Officer are:

1. Whether Petitioners are persons, who are not parties to this contested case, who claim a direct and substantial interest in the proceeding for issuance of the overlegal permits to Applicants.
2. Whether the petition of Petitioners shows direct and substantial interest in any part of the subject matter of the proceeding and does not unduly broaden the issues.
3. Whether the Department may or must hold formal contested case hearings before the Applicants' overlegal loads are allowed to travel under the permit.

V.

STANDARD FOR INTERVENTION

The Petitioners' request for intervention is governed by Idaho Rules of Administrative Procedure 350, 351, 352, and 353. Idaho Rules of Administrative Procedure, IDAPA 04.01.11 *et seq.*, are applicable to this contested case proceeding because ITD has not adopted its own administrative procedure rules under the Idaho Administrative Procedure Act ("IAPA"), I. C. § 67-5206(5); IDAPA 04.01.11.001.02 and .050; 39.03.01 *et seq.* See also, *Laughy v. Idaho Department of Transportation*, Idaho Supreme Court 2010 Opinion No. 110 (November 1, 2010) at 7.

Rule 350 of the Idaho Rules of Administrative Procedure provides that persons, who are not parties to a proceeding, who claim a direct and substantial interest in the proceeding, may petition for an order from the presiding officer granting intervention to become a party. IDAPA 04.01.11.350. Rule 351 provides that petitions to intervene must comply with Rules 200, 300 and 301; must set forth the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the proceeding. Rule 352 provides that

petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing or prehearing conference, whichever is earlier, unless a different time is provided by order or notice.

Rule 353 provides that if a petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding. IDAPA 04.01.11.353.

The phrase “direct and substantial interest” is not defined in the Rules and the Hearing Officer has not found a relevant definition in judicial decisions. However, decisions of the Idaho Public Utilities Commission (“PUC”) and the Idaho Board of Environmental Quality (“DEQ”) that have applied the same standard are instructive. In *J.R. Simplot Company v. Idaho Department of Environmental Quality*, Docket No. 0101-03-07 (Board of Environmental Quality 2003), the DEQ, citing to PUC cases and orders, held that:

The plain meaning of the phrase “direct and substantial interest” suggests that more is required of a would-be intervenor than a generalized interest in the proceedings. To support a claim of direct and substantial interest, the allegations made in support of the claim must be factually supported and specific to the party making the claim. The would-be intervenor must articulate the unique way in which he or she will be affected by disposition of the case. Generalized grievances or concerns shared by all citizens do not suffice.

Id. at 4.

In *Hecla Mining Co. v. IDEQ*, Docket No. 0102-03-13 (Board of Environmental Quality 2004), the DEQ, quoting from *Simplot*, applied the same standard and granted intervention based upon the allegations made in the affidavit of the would-be intervenor in that case. In that

decision the DEQ ruled that “[w]hether the facts alleged by [the would-be intervenor] are ultimately found to be supported is not to be determined at this stage of the proceedings. Instead, the Board must only determine whether [the would-be intervenor] has alleged sufficient facts to state a direct and substantial interest.” *Id.* at 4.

VI.

FINDINGS OF FACT

I find the evidence establishes the following facts:

1. The ConocoPhillips Company (“ConocoPhillips”) is engaged in a project to rebuild its Coke Unit at its Billings, Montana refinery.
2. As part of the project, ConocoPhillips has acquired two new coke drums to replace existing equipment at its Billings facility.
3. The existing drums are 20 years old and are at the end of their useful life.
4. According to ConocoPhillips, the new drums will improve the operational reliability of the refinery, which supplies fuel and other energy products to customers in Idaho, Montana and the surrounding region.
5. ConocoPhillips is not able to continue using its existing equipment without a safety risk, potential interruptions in the refinery’s operations, and increased maintenance costs.
6. ConocoPhillips, working with its transportation contractor, Emmert International (“Emmert”), contacted ITD about ConocoPhillips’s business need to transport two coke drums that have been divided into four loads (sometimes referred to as “four drums”) from Lewiston, Idaho to the Montana border over U.S. Highway 12 (“U.S. 12”).

7. U.S. 12 is a two (2) lane highway that borders the main stem of the Clearwater River from Lewiston to the confluence of the Clearwater River and the South Fork of the Clearwater River near Kooskia. From the confluence it borders the Middle Fork of the Clearwater River to the confluence of the Middle Fork with the Locksa River and the Selway River. From the confluence of the three rivers, Highway 12 borders the Locksa River almost to the Montana border.
8. The Montana border at Lolo Pass is approximately 175 miles east of Lewiston.
9. The new coke drums have been fabricated in Japan and were transported to the Port of Lewiston, Idaho where they are now stored, awaiting transport to Billings.
10. In order to transport the drums by land, they must be cut in half before they are shipped, which will result in four loads.
11. Two of the loads will be approximately 110 feet long, 27 feet wide, 29 feet high, and weigh 646,204 pounds. The other two loads will measure 225 feet long, 29 feet wide, 27 feet high, and weigh 636,200 pounds.
12. The shipments will be large enough to take up the entire two-lane highway, requiring a rolling roadblock along with a number of traffic flaggers and escort vehicles.
13. It is planned that the four loads will be transported over the highways in two separate convoys of two drum sections.
14. The transport vehicles would travel at night between the hours of 10:00 p.m. and 5:30 a.m.
15. The shipments will use standard over-the-road heavy duty Kenworth truck/tractors that meet all current U.S. Department of Transportation emissions regulations and noise regulations.

The trucks will be utilized as prime movers to transport the coke drums as a propulsion mechanism for the dolly beam transport.

16. The reduced speed of the transport will not cause any vibration or impact during the low speed of transport. The noise generated by the Kenworth tractors is equivalent to any standard over-the-road truck traveling at a low rate of speed.

17. The lights proposed for the project will include yellow caution lights to alert traffic of the oncoming support vehicles that meet U.S. Department of Transportation standards. The lighting that will illuminate the dolly beam system will be pointed directly onto the road way surface to enable Emmert's personnel to safely transport the coke drums down the road.

18. All lighting associated with the project is necessary to ensure the safety of all vehicles on the road and, while bright enough to be visible by oncoming traffic, will not be so bright as to significantly penetrate the blinds or curtains of a home or building near the road and to the extent there is any light or noise disturbance beyond the usual highway traffic, it will occur for only a short period of time on four nights.

19. Emmert has made arrangements with the Lewiston Fire Department for an ambulance and two emergency medical technicians to accompany each of the loads through Idaho.

20. ConocoPhillips and Emmert submitted a proposed traffic control plan to ITD. The plan is in excess of 700 pages and includes the following information: (a) the locations and mileposts where the overlegal vehicle can pull over to allow for traffic relief; (b) how the pilot cars and traffic control personnel will be utilized; (c) identification of any railroad tracks being crossed and emergency contact number for the governing entity; and (d) the procedure for allowing emergency vehicles to navigate around the anticipated overlegal loads when necessary.

21. ITD concluded that the traffic control plan satisfied the necessary traffic safety objectives and allowed for frequent passing of vehicles in the same direction.
22. ITD concluded that the traffic control plan complies with the requirements of IDAPA 39.03.11.05(a) and (b).
23. ITD concluded that the reference in IDAPA 39.03.16.100.01 to a ten minute traffic delay limitation does not apply in the current situation because Emmert's traffic control plan ensures that the proposed overlegal movements are made in such a way that the traveled way will remain open as often as feasibly possible and provides for frequent passing of vehicles traveling in the same direction as required by IDAPA 39.03.11.100.05(a).
24. Specific transportation turn-outs and secondary back up locations have been identified throughout the course of the route to prevent traffic delays greater than 10 minutes, except in a few locations.
25. Multiple axels are to be used to spread the weight of the load per Idaho requirements in order to protect the integrity of Idaho roads and bridges.
26. All equipment will be thoroughly inspected and cleaned before transport begins. The coke drum equipment that is to be transported is in new condition, does not have chemical or hydrocarbon inventory and consists of new, clean carbon steel alloys.
27. A full complement of support vehicles providing replacement parts and maintenance tools will accompany each transport vehicle.
28. In an Updated Memorandum of Decision, the Administrator of the Division of Motor Vehicles, ITD (the "Administrator"), has determined that the Emmert overlegal permits are both feasible and necessary. In making the determination, the Administrator considered the safety

and convenience of the traveling public in his decision-making process and determined that the overlegal permits take these factors into consideration and are subject to specific limitations and restrictions so as to address the safety and convenience of the traveling public.

29. The Administrator determined, in his discretion, that it is appropriate in this instance to permit the vehicles to travel uninterrupted for a period not to exceed 10 minutes, except in certain unavoidable locations identified on the permit.

30. The Administrator determined the traffic plan provided by Emmert allows for U.S. 12 to remain open as often as feasibly possible and provides for the frequent passing of vehicles traveling in the same direction as required by the applicable rules.

31. In making his decision, the Administrator weighed the safety and convenience of the traveling public and the preservation of the highway system and determined that vehicles traveling in the same direction as the load may be delayed no more than 10 minutes and that vehicles traveling in the opposite direction of the load may be delayed no more than 10 minutes, except in a few unavoidable locations.

32. Petitioners are persons, who are not parties to this contested case, who claim a direct and substantial interest in the proceeding for issuance of the overlegal permits to Applicants.

33. Petitioner Hendrickson claims that she has a health problem that requires her to get a full night's rest; that her house is located right on Highway 12 near a turnout where the Conoco shipments will pull over to remove dollies required to pass over the nearby Maggie Creek bridge; that the Conoco shipments will thus be delayed longer than 15 minutes at night near her house, with attendant lights and noises that will prevent her from sleeping; that the Conoco shipments will obstruct her ability to use Highway 12 (including crossing the Maggie Creek bridge) if she

needs to go to the emergency room in Orofino, as she did have to do recently with a life-threatening emergency. She claims the shipments will thus interfere with her quiet use and enjoyment of her home, and threaten her health and welfare.

34. Petitioners Laughy and Grubb claim their business operations depend on Highway 12 and the tourism traffic that uses it and that their businesses will suffer losses from the adverse traffic impacts that will be caused by the Conoco shipments.

35. The claims of Petitioners articulate a direct and substantial interest in the contested case proceeding.

36. Allowing Petitioners to intervene will not unduly broaden the issues, because the issues are limited only to the four permits sought by Applicants and evidence that others may seek overlegal permits at some future date is not relevant and will not be considered in this contested case proceeding.

VII.

CONCLUSIONS OF LAW

The following are Hearing Officer's conclusions of law:

1. ITD is an executive department of Idaho state government established by the Legislature and headed by the Idaho Transportation Board. Idaho Code § 40-501.
2. Among ITD's powers and duties are the location, design, construction, maintenance, and reconstruction of state highways and the planning, design, and development of transportation systems that the Idaho Transportation Board determines to be in the public interest. Idaho Code § 40-301(3).

3. ITD is authorized to exercise its discretion and issue a special permit to the owner or operator of any vehicle allowing vehicles or loads having a greater weight or size than permitted by law to be carried over or on the highways and bridges. Idaho Code § 49-1004.

4. ITD has further defined the conditions and requirement for issuing an overlegal permit through the adoption of rules under the Idaho Administrative Procedures Act ("IDAPA").

5. Under its rules, the Department shall, in each case, predicate the issuance of an overlegal permit on a reasonable determination of the necessity and feasibility of the proposed movement. IDAPA 39.03.09.100.02.

6. In determining the appropriateness of an overlegal permit, the primary concern of the Department shall be the safety and convenience of the general public and the preservation of the highway system. IDAPA 39.03.09.100.01.

7. Rule 350 of the Idaho Rules of Administrative Procedure provides that persons, who are not parties to a proceeding, who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party. IDAPA 04.01.11.350.

8. Rule 351 provides that petitions to intervene must comply with Rules 200, 300 and 301; must set forth the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the proceeding. The petition to intervene filed in this proceeding by Petitioners complies with this Rule.

9. Rule 352 provides that petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing or prehearing conference, whichever is earlier, unless a different time is provided by order or notice. Petitioners have complied with this Rule.

10. Rule 353 provides that if a petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

11. The petition to intervene shows direct and substantial interest in the subject matter of the proceeding, which is the issuance of the overlegal permits sought by Applicants.

12. Because there has been no final order in this contested case, the Department must hold formal contested case hearings before the Applicants' overlegal loads are allowed to travel under the permit. To allow the loads to travel before a formal contested case hearing is conducted would contravene the right of the parties to intervene and be heard upon the issues as provided under the Rules of Administrative Procedure.

VIII.

DECISION AND RECOMMENDATION

It is the decision and recommendation of the Hearing Officer that the Petition to Intervene should be granted to the Petitioners.

Further, it is the decision and recommendation of the Hearing Officer that the Department must hold formal contested case hearings before the Applicants' overlegal loads are allowed to travel under the permits.

IDAPA 04.11.01.720.02.a, b, and c.

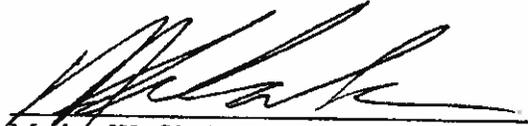
a. This is a recommended order of the Hearing Officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this

Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director with the Hearing Officer issuing the order within fourteen (14) days of the service date of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director. The Hearing Officer issuing this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

b. Within twenty-one (21) days after (a) the service date of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, (b) the service date of a denial of a petition for reconsideration from this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director, any party may in writing support or take exceptions to any part of this Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director and file briefs in support of the party's position on any issue in the proceeding.

c. Written briefs in support of or taking exceptions to the Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within

fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.



Merlyn W. Clark, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of November, 2010, a true and correct copy of the within and foregoing ADMINISTRATIVE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER TO THE DIRECTOR was transmitted via facsimile to:

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Re: ITD/Laughy, et al.

COMMENTS:

To: Tim Thomas, Lawrence Allen, Karl Vogt, Brian Ness - Please see attached Administrative Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order to the Director from Merlyn Clark

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